

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

JUL 20 2005
BY DAVID J. MALAND, CLERK
DEPUTY

CONNECTEL

-vs-

CISCO SYSTEMS, INC.

)
) DOCKET NO. 2:04cv396
)
) Tyler, Texas
) 10:30 a.m.
) May 18, 2005

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONARD DAVIS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

FOR THE PLAINTIFF:

MR. DANIEL PEREZ
MR. MARK CALHOUN
MR. GARRETH SAROSI
MS. JULIE ROBERTSON
WINSTEAD, SECHREST & MINICK
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

MR. BRAD SEIDEL
POTTER MINTON
500 Plaza Tower - 110 N. College
Tyler, Texas 75702

FOR THE DEFENDANT:

MR. SAM BAXTER
McKOOL SMITH
P.O. Box 0
Marshall, Texas 75671

MR. ERIC LAMISON
MR. ADAM ALPER
KIRKLAND & ELLIS
555 California St.
San Francisco, CA 94104

COURT REPORTER:

MS. SHEA SLOAN
211 West Ferguson
Tyler, Texas 75702
903/590-1176

Proceedings taken by Machine Stenotype; transcript was
produced by a Computer.

COPY

P R O C E E D I N G S

THE COURT: Please be seated.

All right. Ms. Ferguson, if you will call the case, please.

THE CLERK: Court calls case No. 2:04cv396, ConnectTel v. Cisco Systems, Inc.

THE COURT: Announcements, plaintiffs?

MR. PEREZ: Dan Perez representing ConnectTel from Winstead Sechrest and with me is Julie Robertson, Mark Calhoun, and Garreth Sarosi. And also with me is Local Counsel Brad Seidel.

THE COURT: Good morning.

On behalf of defendants?

MR. BAXTER: Your Honor, Sam Baxter, McKool Smith. With me is Eric Lamison and Adam Alper. We are ready.

THE COURT: All right. Very good. All right. Y'all can't get along on your preliminary infringement contentions; is that correct?

MR. BAXTER: That's correct, Your Honor.

THE COURT: What seems to be the problem?

MR. BAXTER: Mr. Lamison is going to explain it, with the Court's permission.

THE COURT: How long do you think your presentation is going to take, Mr. Lamison?

MR. LAMISON: Probably about 20 minutes.

1 MR. PEREZ: Your Honor, I can get in and out in less
2 than ten.

3 THE COURT: Okay. Very good.

4 MR. LAMISON: Your Honor, on behalf of Cisco we have
5 moved to compel ConnectTel to provide a supplemental chart
6 complying with your Patent Rule 3-1(c), which requires the
7 plaintiff to prepare with its preliminary infringement
8 contentions a chart identifying specifically where each
9 element of each asserted claim is found within each accused
10 instrumentality. That is the rule under which we have
11 presented our motion.

12 And by way of an overview, there are four issues
13 that have been presented with the preliminary infringement
14 contentions that have been provided by the plaintiffs. By way
15 of background in this case, ConnectTel asserts 120 claims from
16 four patents against more than 100 products seeking, according
17 to their Amended Complaint nine billion dollars in damages
18 from Cisco. This is a complex case where they have asserted
19 the patent claims against the vast majority of products that
20 Cisco makes. It is a very big case in terms of the number of
21 products that are at issue.

22 In order for us to defend the case and to orderly
23 progress the case toward orderly claim construction, it is
24 necessary for us to understand why each of these more than 100
25 products are alleged to infringe each of 120 claims. It is

1 important for us to have that information so that we can
2 prepare claim constructions for Your Honor that are limited to
3 those terms that are actually in dispute so that we don't
4 present Markman briefing on more claims than are necessary or
5 miss claim terms that may be needed to be addressed. And
6 without an understanding of where the infringement is, it is
7 impossible for us to efficiently do that.

8 So what I would like to describe are the four issues
9 with their contentions, and then I have some specific examples
10 on slides to illustrate this.

11 First of all, they don't address each accused
12 product but instead they have addressed four categories.
13 Those four categories that they have created are routers,
14 switches, gateways, and a category called the IOS operating
15 system. They use each of their four categories as a surrogate
16 for all of the products within that alleged category. So we
17 do not have a chart that provides a contention with respect to
18 any single specific Cisco product that is accused in this
19 case. Not one. It is a summary chart.

20 The second issue, which we will show in more detail,
21 is that this confusion is compounded by the fact that most of
22 their charts simply mimic the claim language. The left-hand
23 column, as we will show Your Honor, has the claim language.
24 The right-hand column has the claim language with the word
25 "Cisco" for the vast majority of the elements. We do not have

1 a circumstance where they have walked us through from
2 beginning to end one claim with respect to even one product.

3 The third issue is that what they have done instead
4 is they have provided footnotes, 600 footnotes where they say
5 that is where you can find the identification of the accused
6 element. Out of those 600 footnotes, 590 simply say "see
7 supra." Ten footnotes, approximately, have text. But that
8 text is not a description of the infringement. It is
9 references to page numbers and Cisco data sheets.

10 Of course, when we go to the Cisco data sheets we
11 are not able to determine which passage or which quote or
12 which portion relates to the claim elements and, therefore, it
13 is basically left as -- essentially it is a treasure hunt, but
14 there is no treasure.

15 By way of background, as I mentioned, what is the
16 harm? We want to move this case forward orderly and
17 efficiently because this Court is well-respected for moving
18 patent cases to trial; under this Court's rules, very prompt
19 trials. I practice in San Francisco and we have similar
20 rules, but our courts don't move these cases as quickly to
21 trial. Cases tend to take three years to get to trial. That
22 is not the way things work here. This Court is well-respected
23 for promptly moving cases to trial and using those same rules
24 but in a different way.

25 This Court uses the rules to make sure the parties

1 move their cases to trial. If we don't know what our 100
2 products that they are seeking nine billion dollars in damages
3 are allegedly doing to infringe, how do we identify claim
4 terms under this Court's docket schedule where we are supposed
5 to provide claim constructions on June 16th? We have had to
6 identify more than 75 claim terms for potential construction,
7 not because we want to construe 75 terms. We don't. We
8 certainly don't want to brief them, and we certainly don't
9 want to burden this Court with terms that may not be
10 necessary.

11 But if we don't know how they are applying the
12 claims, we are stuck because we are going to lose the date.
13 We might not put the term on the table. Then we find out how
14 they are applying the claims. Then we say this is the term to
15 construe. We will have missed our opportunity. We are forced
16 to do all of this work because we don't know why we supposedly
17 infringed. That is the only reason we are here.

18 We have no interest in filing motions
19 unnecessarily. We are not asking for any sanction. We are
20 not asking for any money. We haven't engaged in name-calling.
21 We have simply said we want to know why, why when I call the
22 client and say these guys are asking for nine billion dollars.
23 Why? I don't know. I have looked through their charts, and I
24 don't know what the infringement is. My colleagues don't
25 know. People we have consulted with don't know. That is why

1 we are here.

2 In addition to that on noninfringement you can
3 imagine the number of people we may need to meet with to
4 discuss these over 100 products that represent the vast
5 majority of a multi-billion dollar company to understand,
6 well, if this is their contention do we or why don't we do
7 this, et cetera; but without knowing the contention, we are
8 basically hampered in our ability to do that.

9 And on invalidity, boy, we would like to know how
10 they are asserting these claims because these products have
11 been around for a long time. Cisco was founded in 1984. More
12 than a decade before Mr. Kaplan, the inventor in this case,
13 first came up with his technology. And Cisco basically came
14 up with the technology that enables Internet work.

15 A group of Stanford University scientists came up
16 with innovative routing methods. We are innovators in this
17 field, and these products that they are accusing have existed
18 long before Mr. Kaplan's patents. We want to know how they
19 are finding infringement. That is important to understand how
20 these products that have preexisted these patents by more than
21 a decade could infringe but have these patents be valid.

22 Until they tell us -- and I submit they may be
23 concerned about taking a position because they may be
24 concerned that it is going to lead to a validity question so
25 they are avoiding it. They are avoiding it I think

1 deliberately so they can move the case forward, pick an
2 infringement theory that they think is going to enable them to
3 maintain validity. And so we are not able to prepare the
4 appropriate defenses, in our view.

5 I would like to now show the Court an example of
6 their claim charts that mimic the claim language. We have
7 chosen as an example Independent Claim 1 of the '404 Patent,
8 which is one of the four patents in suit. Following the claim
9 preamble, which is the large box at the top, we have the
10 elements of the claim. And under the patent law, as this
11 Court is I am sure familiar, there has to be satisfaction of
12 every element of the claim to be infringing.

13 And under this Court's patent rules they have to
14 tell us where each element, each element is found in each. So
15 if we go to the steps that I have highlighted in blue and in
16 the column it says the claim requires receiving the data. The
17 claim also requires examining the received data. With respect
18 to Cisco, they say Cisco routers receive data and examiners
19 receive data. That is not particularly helpful. That is what
20 the claim says. They put the word "Cisco" in the right-hand
21 column and that is their identification of that element. The
22 Court will also note there is no footnote on this element
23 because we will get to the issue of whether these footnotes
24 satisfy the rules, which we don't think they do. But in here
25 there is no footnote.

1 So this element, we are entitled to know where each
2 element -- that is this Court's rules -- each element of each
3 patent is found in each accused product.

4 Go to the next one.

5 There is a step of identifying the examined data
6 which matches said one of the one or more first variable
7 parameters. They say, "The Cisco routers identify the
8 examined data which matches one or more of the first variable
9 parameters." It is just a direct quote of the claim language
10 with the words "Cisco" and "routers"; and, again, I don't see
11 a footnote on this one. And also it doesn't tell us why they
12 are doing it.

13 We can move forward. Step G, "analyzing said
14 measured second variable parameter and said predetermined
15 parameters." What do they say for Cisco? "The Cisco routers
16 analyze the measured second variable parameter and the
17 predetermined parameters." Again, this is simply a direct
18 quote of the claim language with the word "Cisco." It is not
19 informing us of these issues.

20 And then if I move forward. This claim is a
21 method -- this is of importance -- they are all important, but
22 this is a particularly important step in a claim because this
23 sort of ties all these elements together, this particular
24 step, the determining step. And they simply quote the claim
25 language. Determining which of said patents, et cetera, and

1 the lower box which is the language from their chart, they
2 just say the Cisco routers do it. That is it.

3 There is a footnote on this one. It is an
4 interesting story about this footnote because when they served
5 their original contentions on March 17th, there was no
6 footnote at all. So we had a meet and confer about it, and we
7 said, folks, we need to know why we infringe. They said what
8 is wrong with our charts? You copied the claim language. We
9 have footnotes. I said, well, I will get to your footnotes
10 because I don't think they work. But let's go to one of these
11 key critical steps in the claim, the determining step. There
12 was no footnote.

13 So they served a supplement, and they put a
14 footnote. And the footnote said "see supra" and it goes to
15 some other footnote that had text. So it was just a cosmetic
16 change. So this is an example of the independent claim and
17 the way that they approached it. Now, there are some
18 elements -- this is another example. This is the final
19 element. Again, it is just a verbatim quote transferring the
20 data to the remote destination. "The Cisco routers transfer
21 the identified data to the remote destination." Again, it is
22 an exact quote of the claim language but inserting the word
23 "Cisco."

24 As you can see also this isn't an identification of
25 any product. This category -- the one that I went through was

1 for the router category. In other words, they didn't do
2 this -- the chart doesn't refer to any specific Cisco product
3 at any time, whether it is a router, a switch, or a gateway.
4 So we have the issue that they are not telling us the
5 products. They are certainly not going to each element of
6 each product, and it is leaving us guessing.

7 There were some steps where they inserted little
8 tidbits of information. But that information doesn't -- they
9 haven't done it for each element. They haven't done it for
10 the key element of determining, the one that ties it
11 altogether. Even when they give us these snippets and say,
12 well, this is, for example, the way they do this and they
13 don't really say how it is done with any detail. So I don't
14 think these were sufficient either. But they have never
15 once -- I think from a larger perspective of this claim, they
16 have never once walked us through this claim from beginning to
17 end and shown us where each element of this claim is found in
18 any product. It has not been done.

19 And in a case where we have more than 100 products
20 accused of infringing 120 claims where they are seeking nine
21 billion dollars in damages I think it would be fair for them
22 to tell us why they think we infringe.

23 Similarly, we have these dependent claims. These
24 are the ones that come down off independent claims, as Your
25 Honor I am sure is familiar with the distinction between

1 independent and dependent claims. There are many, many
2 dependent claims in these patents.

3 With respect to the dependent claims, ConnectTel's
4 charts simply copy verbatim the language. There is no snippet
5 in even the dependent claims. It says this is the claim
6 language. And they insert the word the Cisco routers
7 generally. Again, no reference to a specific product. And
8 nothing other than the quote of the claim language.

9 Interestingly, when they served the original charts
10 on March 17th there weren't any footnotes for any of the
11 dependent claims. None. So we asked them on the phone; and,
12 again, I will get to the footnotes because I don't think that
13 works for them. But they said the footnotes are the solution.
14 There is not a single footnote against a single one of the
15 dependent claims. How do you explain that?

16 They said we can fix that. So we spent all day on
17 the phone meeting and conferring with them on the following
18 day trying to get these contentions. The result of it is they
19 have sent us over a supplement and they have added a footnote
20 to each dependent claim; and as the Court can see, each one of
21 those footnotes says "see supra." There is no new text, there
22 is no new information. It is just referring us back to a
23 footnote. It really was difficult to try to advance the ball
24 forward and get some further information.

25 And here is an example of what these look like. 590

1 of the 600 footnotes say "see supra." They don't have any
2 text at all, let alone a reference to a document or let alone
3 reference to a passage in a document. I would now like to
4 address those few footnotes out of the 600 footnotes that have
5 text. What that text is are string citations to multiple
6 Cisco data sheets that they provided in binders with their
7 charts. Those string citations which are not -- first of all,
8 they didn't footnote every element. Even in those instances
9 where they did footnote it we have gone to these and they have
10 provided references to pages of data sheets.

11 We are unable to find on those pages of data sheets
12 the alleged claim element. We are not able to find it because
13 these pages have lots of text on them and we are not able to
14 find on these pages where the element is because they haven't
15 told us. They haven't told us. They believe that -- their
16 hope is that because they provided four boxes -- or binders of
17 documents, that one would conclude they must have complied
18 with the rule because they have given us this very large
19 massive piece of information, so it must comply with this
20 Court's rules. But it doesn't.

21 We don't know -- we are entitled to a chart. The
22 language is rather specific. A chart that specifically
23 identifies where each element of each asserted claim is found
24 in each accused product. We just don't have that. And these
25 footnotes which are sporadically used, again, 590 of 600 just

1 say "see supra." Few of them have these references to pages.
2 We are not able to lift from these pages where the element is
3 found on that page.

4 We don't think the elements are there. That is one
5 of the issues, but certainly they should have to put them in
6 the chart so we can see them. This is an example of what a
7 page looks like. There is lots of text on the page. We go to
8 the page, but we don't know where the element is.

9 The other thing they did when they supplemented was
10 they said, okay, well, it sounds like you guys don't
11 understand your products. So to help you understand your own
12 products we are going to send you a nutshell tutorial about
13 Cisco IOS. They sent us a book saying -- we are going to help
14 you understand your products. The issue isn't that we need
15 help understanding our products. The issue isn't that our
16 Cisco folks that we interact with to follow this case don't
17 know how their products work. The issue is they haven't told
18 us where the infringement is in our products. That is why we
19 are here. And providing a third-party nutshell about our
20 product doesn't meet their obligation to tell us where it is.

21 In sum, the charts simply mimic the claim language.
22 They don't identify a single structure, process, algorithm,
23 feature, or function of any accused product. We did wish to
24 meet and confer. We certainly don't want to spend our time on
25 motion practice. We very much wish to resolve this issue

1 without the Court -- needing to seek the Court's
2 intervention.

3 After our first meet and confer the parties agreed
4 to have a second meet and confer where they would spend
5 essentially a full business day on the phone talking to one
6 another and walking through the claim and see if we could get
7 the information and then discuss an appropriate supplement.
8 Two lawyers in my office spent a full day on the telephone
9 with counsel for ConnectTel. We also had the resources of a
10 consultant available. And basically said let's walk through
11 one claim from beginning to end and show where the
12 infringement is in one product or a few products.

13 We tried to do that, but we were unable through that
14 call to determine how even one product infringed one claim.
15 In fact, ConnectTel counsel mentioned that they had further
16 facts they had learned in their prefiling investigation, but
17 they contended those facts were privileged from discovery and
18 that we were not entitled to know those facts.

19 After that meeting they served supplemental picks to
20 reflect the meeting; and as we have shown, those supplemental
21 preliminary infringement contentions did not provide any more
22 information. They just added multiple hundreds of footnotes
23 that said "see supra." They didn't do anything to provide
24 more information. They added footnotes to all of the
25 dependent claims that said "see supra." They didn't provide

1 any more information. Yet we spent -- two lawyers a full day
2 on the phone. And we couldn't get one -- the identification
3 of the infringement of one claim against a few products.

4 And Mr. Perez kindly sent me a letter offering to
5 continue to have such discussions. He said in his letter --
6 you know, the parties were only able to discuss one claim with
7 respect to a few products. We spent the whole day, two
8 lawyers on the telephone, one claim and a few products. We
9 have 120 claims and more than 100 accused products. If that
10 is what it takes to try to figure out their theory and we
11 didn't, we weren't able to get it, it confirms they need to
12 put it in the chart so that we can take it from the chart.

13 So that was the only reason that we said, you know,
14 these dates are clicking by. At this point we have to focus
15 on getting a motion to Your Honor. We also had to do our
16 invalidity contentions. This was in early April when we had
17 this last discussion when he said at this point we need to
18 move toward. One of the things they criticize in the briefs
19 is they say it took us three weeks to get our motion papers
20 together. The reason it took us three weeks to do it was in
21 the middle our invalidity contentions were due. We didn't
22 have a clue how they were applying the claims.

23 So when we did -- we had to think about it from
24 this very vast perspective of how are they applying the
25 claims. It took us an enormous amount of time to put those

1 together, I submit far more time than it would have or should
2 have taken if they had told us up front under Your Honor's
3 rules why we infringe, how they are applying the claims. We
4 could have certainly spent less time putting that together
5 than having to guess how they are applying the claims. And so
6 we wanted to file the motion. We also wanted to comply with
7 the rules.

8 And we, therefore -- it did take us three weeks to
9 get this motion on file because we were busy trying to comply
10 with this Court's rules on the invalidity contentions which
11 were due at that time, right in the middle. They never did in
12 that offer say we offer to provide more information. In fact,
13 they never in their papers said we will supplement. They say,
14 well, we may need to supplement in the due course of
15 discovery. But they have never once said when they will do
16 it. They have never said we are going to supplement. And
17 they have certainly never said we are going to supplement
18 before Cisco has to provide all of its claim constructions in
19 this case.

20 To the contrary, what -- the way they are doing this
21 is they are going to supplement when it is convenient for them
22 without regard to what this Court's scheduling dates are. So
23 by the time we figure out why they say we are infringing, we
24 will have already had to provide our claim constructions. We
25 will already be in the Markman briefing, and that is not the

1 way that Your Honor's rules are designed. That is the
2 antithesis of the orderly progress of this case that Your
3 Honor's rules dictate that enable this Court to have such a
4 tremendous reputation for moving cases towards trial very
5 promptly and very efficiently.

6 This issue about the facts, by the way, that they
7 say we are not entitled to the facts they have obtained in the
8 prefiling investigation, I believe that is inconsistent with
9 the longstanding rule that underlying facts are not
10 privileged. We are not asking for their documents that they
11 created. We want the facts put into the chart. The
12 underlying facts aren't work product --

13 THE COURT: Slow down just a little bit for the
14 Court Reporter.

15 MR. LAMISON: Sorry. The underlying facts are not
16 protected from disclosure. That is a longstanding rule. We
17 even cited some of Your Honor's decisions that acknowledge
18 that, and appellate court decisions. It is a pretty universal
19 rule. And similarly, while we didn't cite those cases, it
20 occurred to me while I was preparing for the argument last
21 night, that is similar to something people say when they are
22 asking for contention interrogatories. And they say, well,
23 that is a contention interrogatory. And they say, well, I am
24 going to object on work product. And there are many cases
25 that say you can't object to a contention interrogatory on a

1 work product basis. In fact, it does require you to put your
2 mental impressions and theories into the chart.

3 The facts, and to a certain extent a contention
4 interrogatory, does -- it gets how are you applying the claim.
5 You have to disclose it. And these rules are meant to do away
6 with the need to have these interrogatories and to do it
7 through the rules. But it is the same concept. You are
8 supposed to get the contentions. And the underlying facts nor
9 are the contentions privileged. They shouldn't be entitled to
10 have contentions about why infringement is occurring but hold
11 them back until they feel it is safe for them to put them on
12 the table and we are done with the claim construction.

13 Interestingly, as part of their response they say
14 they need access to our information in order to provide those
15 contentions. A few points on that. It is worth noting that
16 they just -- they didn't plead this case on information and
17 belief, but instead they specifically pleaded that over 100
18 products "blatantly infringe" the asserted 120 patent claims.
19 In fact, they just filed an amended complaint less than two
20 weeks ago where they specified these products in the Complaint
21 and they say they blatantly infringe.

22 I have been practicing ten years in this space. Not
23 a long time, but a fair amount. I have never seen a complaint
24 where somebody uses the word "blatant" in front of
25 infringement. I have seen willful. I have seen various

1 allegations, but blatantly infringing is a pretty bold
2 statement. If the infringement is blatant, why do I have to
3 go trancing around through these charts to footnotes, to
4 supras, and this and that and not be able to find out how a
5 single product infringes a single claim?

6 They are not saying in their Complaint that they
7 don't know. They are saying the exact opposite. They are
8 saying it is a blatant infringement. Where is the blatant
9 infringement in their chart? It is not there. We believe
10 that request is consistent with the relief that Your Honor
11 ordered in the American Video Graphics case in which my
12 colleague Mr. Baxter was involved and ordered a
13 supplementation of the preliminary infringement contentions 30
14 days after the production of documents.

15 What we have asked for in this case is
16 supplementation. We haven't asked for any money or sanctions.
17 We want them to tell us, and we would sure appreciate an order
18 from Your Honor that says you have got to do this, folks, you
19 have got to do this. You have got to do it at a particular
20 time, and this is that time. And that is what is going to
21 happen. That is what we asked for. And I think the relief we
22 have asked for is very consistent with what we requested in
23 American Video Graphics. Frankly, I don't care what they look
24 at. I am not trying to say you have to tell us now based only
25 on this bucket of information. They are accusing me of trying

1 to set up a Rule 11 claim.

2 Whether there is a Rule 11 claim or not, I just want
3 to know why we have infringed so we can defend the case. That
4 is far more important, so I am not trying to box them in on
5 what document they had at what time. I just want to know. I
6 don't frankly care what they look at; but if the belief is
7 that they are not really going to tell us, one, what they
8 already know, which is more than what they have told us; and,
9 number two, they are just going to wait and do it after we go
10 through discovery and we get done with the claim
11 constructions, that is just not fair. It is not fair. It is
12 not consistent with the way this Court would like to progress
13 the case under the patent rules to a prompt trial. We really
14 do need this information before we provide claim
15 constructions.

16 THE COURT: Okay. Thank you.

17 Response, Mr. Perez?

18 MR. PEREZ: Yes, sir. Your Honor, when I was
19 challenged with the opportunity to present picks to you in
20 this Court, I did my due diligence. I went to Glenn Thames,
21 Local Counsel, with Potter Minton and I asked him what do you
22 have to do when you present picks to Judge Davis and actually
23 the way you have done in front of Judge Ward? And I got
24 various samples of what is done before you, Your Honor.

25 Likewise, I am on the defense side of three cases

1 pending in the Eastern District of Texas, and I have seen
2 several picks presented to me; and candidly I was a bit
3 frustrated because they were too vague for me. I wanted these
4 to be thorough and detailed. I went to extra efforts to make
5 sure we were thorough and detailed. I want to walk you
6 through and illustrate what we did for Your Honor. And,
7 likewise, Your Honor, I went through your case of March 17th,
8 2004 and then your recent case the March 11, 2005 and relied
9 upon those.

10 Your Honor, I have done everything I believe
11 necessary, and candidly I think we have gone beyond that. I
12 am going to show that to you here in just a moment.

13 We did all of this without getting access to any
14 source code or confidential information from Cisco. We went
15 on Cisco's website and we went to publicly-available
16 information to get our infringement contentions. And,
17 likewise, we relied upon a consulting expert who had some core
18 work product that we got involved in and learned and patent
19 lawyers, EE's got involved and did the analyses. We put
20 together in our infringement contentions a thorough analyses,
21 which incorporates a lot of the core work product. I
22 understand that. That is what he was alluding to.

23 What I do find a little troubling, Your Honor, is he
24 puts in front of the board the '404 Patent. The '404 Patent
25 is a patent we didn't even discuss. It was a patent he wasn't

1 willing to discuss. We discussed the '307 Patent for one full
2 day. He brought to our attention two elements he thought were
3 important to give more detail on. That is a determining step
4 and some more information on the dependent claims.

5 What we did was we supplemented. And after we
6 supplemented we invited him to meet and confer with us longer.
7 And instead of meeting and conferring with us for 21 days, he
8 teed up this motion, and we are here today, Your Honor.

9 Let me tell you a little bit about the technology
10 first in the invention and then I want to go to the claim
11 charts and walk through what we did for Your Honor and for
12 this Court. What ConnectTel patents are, is it was the first
13 time there was the use of a unique combination to optimize the
14 transmission of data from point to point, from Dallas to -- if
15 you are in New York to New York. What they did is they
16 analyzed, or the patent talks about is analyzes the property
17 of the data, what are the characteristics of the data.

18 It also incorporates factors of predetermined
19 parameters, such as, is it priority mail? Is it important for
20 it to be secured? Is it a large package? Is time not of the
21 essence? Likewise, on a real time bases -- and this is
22 important, Your Honor -- on a real time bases it determines
23 the condition of the path, the pipeline so to speak, and
24 optimize that pathway through algorithms. And by their
25 nature, Your Honor, algorithms are embedded in the source

1 code. And certainly we did point to intelligent routing,
2 optimization, language in their product spec sheets that
3 alluded to that. And, candidly, Your Honor, I have offered
4 many times to supplement these picks after we get access to
5 the source code. The first time they were made available to
6 us? Yesterday. Let me get into the analysis, Your Honor.

7 THE COURT: Do you have all of the source code you
8 need now?

9 MR. PEREZ: You know what, Your Honor, we don't know
10 that. We have asked them to characterize the volume and to
11 characterize what they have given us. They haven't given us
12 that. Garreth Sarosi over here went over there yesterday and
13 tried to do an assessment of what the source code was and to
14 what extent we have all of the versions, and I can't tell you
15 in all candor that I know. We hope in the next week or so to
16 find that answer out. We will have our consultant go down
17 there. We have a few more hoops and loops we have to go
18 through under the protective order. And that is kind of
19 important to this -- and if I am talking too fast for the
20 Court Reporter -- I'm sorry. I will slow down.

21 There is some things that we have to go through in
22 order to get access to the source code. We have our expert
23 vitae that we are going to give over to counsel probably
24 tomorrow, let them look at it, and they are going to have
25 access to that source code to look at it and analyze it.

1 And, by the way, Your Honor, the reason why the
2 Court entered the protective order as late as May 9th is
3 because we didn't use this Court's standard protective order
4 because Cisco didn't want to. And you know what, we
5 negotiated a long time on that protective order. They wanted
6 a protective order --

7 THE COURT: Okay. Let's go on with --

8 MR. PEREZ: Yes, sir. Let me go ahead and get the
9 claim charts. I am going to walk around if you don't mind,
10 Your Honor.

11 THE COURT: Okay.

12 MR. PEREZ: I don't have electronics, which I should
13 have. But I do have a three-ring binder for you to look at,
14 and you can look at it along with counsel. Counsel has
15 samples of those exhibits. Your Honor, there may be more
16 exhibits than are necessary. But I am prepared to go ad
17 nauseum if necessary to show you what we have done.

18 Here are claim charts. This one is the '307 Patent
19 Claim No. 1. This is the only claim -- we actually had a
20 conversation with counsel, the only one. We tried to go over
21 what we did. Looking at the footnotes that are -- that they
22 say have no substance, let me give you an example of what we
23 have done. Here I will walk you through Footnote 3, which is
24 the determining step. I will walk you through property of the
25 data file step, and I will walk you through their parameter

1 step -- Your Honor, if you want to go through more we sure
2 can.

3 Here are the footnotes we are referring to. These
4 footnotes, they don't gloss in point to a product spec sheet.
5 As you can see, Your Honor, for example, on the second -- the
6 Footnote No. 3, Tab No. 2, we refer to a specific Cisco
7 Internet router data sheet picks -- 1, 2, and 3. You go to
8 Footnote No. 3. We refer to the IOS -- the "Cisco IOS In A
9 Nutshell," Pages 101 to 127. We have a copy of that if you
10 would like to look at it. And also Tab 32, which is a routing
11 data sheet. Page 1 and 2 and 4 and 7. So if you look at the
12 first determining step, and that would be Pages 1 and 2, 4
13 and 7, you have to ask yourself does it support that
14 determining step.

15 Your Honor, the determining step is actually
16 described -- and I have highlighted just a portion of it.
17 "Cisco's OER helps enable the intelligent path selection of a
18 plan edge based upon performance sensitive routing metrics
19 such as time, loss, path availability, traffic load
20 distribution, and cost minimization." It actually goes on to
21 what I talked about earlier. It is this real time routing
22 adjustment based upon performance that makes Cisco's OER an
23 important building block for building highly available path
24 access across Internet.

25 And I also want to refer to another page just on

1 that one footnote. We refer to Page No. 2 which refers to
2 performance parameters, which are the variables I am talking
3 about that are being weighted. Let me -- I apologize for the
4 encumbrance of these things. Also refer to Page No. 4, which
5 talks about route optimization and performance
6 characteristics. This is just one element from one patent of
7 one product.

8 Furthermore, I would refer to Page No. 5. Again, it
9 talks about different measurements and things that you would
10 consider in your optimization step, Your Honor. That is the
11 determining step. That is just one product, that product
12 being the Cisco 10720 referring to one element of one patent.
13 We did that for each and every product. Here are the claim
14 charts -- and I apologize to this Court, and I did in my brief
15 that we actually listed this as an attachment when we filed
16 it. It was very cumbersome. But it is not just to illustrate
17 the voluminous nature. If you go in reverse order you have a
18 binder for routers, which are some 20-something, switches,
19 gateways, and the IOS software.

20 We went to the Cisco website and we pulled the
21 specification sheet and then we went claim by claim, element
22 by element for each and every one of those. Your Honor, I
23 think that goes above and beyond. Certainly put them on
24 notice. And the reason why it put them on notice is when they
25 gave us their invalidity contentions they gave me three boxes

1 of invalidity claim charts and a disk that was equivalent to
2 100 boxes of documents. I think they know what we want.

3 If we want to go further, Your Honor, I can talk
4 about the property of the data file. I can go through that.
5 I also have some other handouts for you about the routers and
6 the gateways. I think you know what I am getting at. I can
7 give you some illustrations, Your Honor, of the dependent
8 claims. I think that is probably important, as well. I can
9 go as long as you would like.

10 THE COURT: I have seen what you have done.

11 MR. PEREZ: Got it. Let me go back, Your Honor,
12 over here. I have given you in that handout --

13 And, Julie, would you mind giving them a copy so
14 they can have access to them.

15 A sampling of what we did for our independent
16 claims, what we did for our routers, and what we did for
17 gateways.

18 Yeah, there is common language. And the reason
19 there is common language is you can only call a property of
20 the data so many things. And we refer to the same footnote.
21 And they make fun of my supras. Well, they ought to read the
22 supras because the supras relate to actual text in those
23 product spec sheets.

24 Similarly, Your Honor, the products themselves, the
25 families of the products. They said there was 110 products.

1 I can show you examples of product spec sheets that are
2 almost -- revised. So a lot of their products on their
3 website, and there may be ten products, eight products that
4 have almost the same description. So, yeah, it is repetitive
5 in nature. I understand that. But I think it is thorough.

6 Again, Your Honor, we did all this without access to
7 confidential information. And when we get the confidential
8 information, when we get the source code, we will supplement.
9 We have said that in our briefs, and I have said that to them
10 on the phone.

11 I do have to rebut a couple of points they made,
12 Your Honor. And I said it once, they never discussed with us,
13 they never picked up the phone and asked us about the '404
14 Patent that they threw up on the board. If they had asked us,
15 I guess -- my question is what do you want to know? Ask me.
16 That is what I asked in the correspondence and asked them on
17 the telephone. When they asked me about the claim '307, I
18 gave them the determining step. When they talked about the
19 shortness of explanation to the dependent claims, I gave them
20 back-up for each and every dependent claim.

21 I don't think they should be mocking me giving them
22 the "Cisco IOS In A Nutshell." We found it helpful. I guess
23 it refers to Cisco's networking simplified. It has the same
24 kind of language. I wanted to make clear to them what I was
25 looking for. Again, I think that their production to me in

1 the invalidity claim charts made that real clear.

2 Your Honor, we will supplement. But in your two
3 opinions that are out there, I notice some very interesting
4 language. One -- in one particular case, it was your first
5 case, you made mention -- it was AVG case. You made note that
6 since counsel is at an impasse, I have got to rule. The only
7 impasse here was they are willing to drive in my direction
8 after I invited them to. I would love to open up this
9 dialogue. I would love this Court to make us open up this
10 dialogue. We will supplement to the extent necessary. We
11 want them to know what they are being accused of infringing
12 because we don't want this case to go offtrack.

13 We complied with this Court's mandate, both under
14 the ST Microelectronics and under the American Video Graphics.
15 We just got access to the source code. And we will beef up
16 our claim charts as required and as necessary.

17 THE COURT: All right. Mr. Perez, I think you are
18 reading ST too broadly and American Video Graphics too
19 narrowly.

20 MR. PEREZ: Tell me, sir. I will be pleased to
21 address your concerns.

22 THE COURT: Well, I want to ask you are you serious
23 about this lawsuit?

24 MR. PEREZ: Yes, sir.

25 THE COURT: As the Court expects plaintiffs when

1 they file a case to be able to identify their infringement
2 contentions, and I don't think that you have complied. You
3 know, it concerns me that you are alleging 120 claims and 100
4 products. And I hope this is not some kind of just shotgun,
5 throw everything up and see if we can find something that
6 sticks. But I am sympathetic to Cisco's position, and we need
7 to talk about what kind of relief to give them to get this
8 thing back on track. This thing is set for trial in August --
9 on August the 14th of 2006.

10 MR. PEREZ: Yes, Your Honor.

11 THE COURT: And for this Court to be able to move
12 cases as fast as you would like for this Court to move it
13 being the plaintiff in this case, we have got to have greater
14 compliance than what I think you have given here. I don't
15 think repeating the claim language and I don't think string
16 citing back to their literature is enough.

17 Now, I want to know what does Cisco need to know
18 what this lawsuit is about?

19 MR. LAMISON: Thank you, Your Honor. We would like
20 to have supplemental contentions that do provide the
21 infringement. We would like, ideally, to have those 30 days
22 before we have to provide claim constructions. That would be
23 the -- that would be very helpful. It would enable us to
24 focus the claim constructions and not have to overconstrue or
25 underconstrue. And with respect to the discovery --

1 THE COURT: Would exemplar examples be helpful to
2 you?

3 MR. LAMISON: Absolutely.

4 THE COURT: That is one thing I noted that you don't
5 give a single exemplar example of stepping it through as to
6 this particular type of product.

7 MR. PEREZ: Your Honor, what I can certainly do for
8 Cisco and for this Court is to do precisely what I did in the
9 highlighted areas. I have referred to pages as descriptions
10 of where those elements exist. I have -- and Your Honor, it
11 was something that certainly we are more than willing to
12 share. Obviously this is work product. But we have our claim
13 charts; and we refer to, for our own edification, highlighted
14 areas where those very elements -- for example, on this one,
15 Your Honor, exist. Here we are talking about property of the
16 data. These are features of virtual private networks over IP.
17 I can refer to those highlighted areas with the understanding,
18 of course, it may be in other portions of the text. I can
19 refer to specific highlights within the data sheets that I
20 have identified.

21 THE COURT: Are you going to expect this Court to
22 construe 120 claims?

23 MR. PEREZ: Your Honor, I don't believe that is
24 going to happen, no, sir.

25 THE COURT: When are we going to get it narrowed

1 down?

2 MR. PEREZ: I will have it narrowed down within
3 probably 60 days once I have seen their source code analyzed
4 and I can back off on some of those claims. I would suspect
5 this thing would be trimmed down to less than 50.

6 THE COURT: Okay. What else do you need?

7 MR. LAMISON: We would like an order similar to the
8 one in American Video Graphics that orders them to supplement
9 within "X" number of days of the documents being provided. I
10 think that is the best way to insure we get the information.

11 THE COURT: When are you going to provide the
12 documents?

13 MR. LAMISON: We have started to do that and -- as
14 fast as possible. The protective order unfortunately took a
15 long time. It was proposed even before the docket control
16 order was in place. There were disagreements over whether we
17 were -- what third parties or special protections for source
18 code. It took an inexplicably long amount of time to come to
19 an agreement on that, and we were pushing very vigorously to
20 get the protective order in place, so -- that is not because
21 we weren't willing to talk to them. We were very vigorously
22 trying to get that in place.

23 So we have certainly got source code that is in Mr.
24 Baxter's office right now that Mr. Sarosi came over to see
25 yesterday. If they want to see every single version of source

1 code, that is quite a bit --

2 THE COURT: Is that what you want to see or
3 exemplar --

4 MR. PEREZ: Your Honor, I will probably need to see
5 more for the past devices. There are certain devices I have
6 alleged that are present devices as of the first quarter of
7 2005. Some of those devices may fall out once I look at the
8 algorithms of the current source code, but there are some past
9 devices that may be infringing -- those are documents that
10 were requested. I assume we are going to get those, so I may
11 need to see some older versions of the source code to verify
12 certain algorithms.

13 THE COURT: What else do you need?

14 MR. LAMISON: That's what we need.

15 THE COURT: What do you need?

16 MR. PEREZ: I do need to get expedited them
17 approving of the experts looking at it. I have got to have
18 access to McKool's office in Dallas and get our people in
19 there to look at the source code and unravel it. Your Honor,
20 I think 30 days is a little bit tight given we just got access
21 to the source code. I would propose 60.

22 THE COURT: What is this going to do to your
23 schedule?

24 MR. LAMISON: Well, that is the issue. In fairness
25 what we want is to have these contentions before we have to do

1 the constructions. I think for 120 claims and 100 products,
2 30 days to look at that would be appropriate. I think 60 days
3 to do this from, for example, today, then that would be 90
4 days which would put us out to -- that would put us into
5 mid-August rather than June 16th, which is the current date.
6 August 16 would have been the discovery deadline for claim
7 construction.

8 THE COURT: Do you have any problem with that?

9 MR. PEREZ: Which one, Your Honor?

10 THE COURT: Pushing it out to August.

11 MR. PEREZ: I don't have any problems providing our
12 Markman Hearing doesn't move and our trial date doesn't move.

13 MR. LAMISON: I don't think we need to move the
14 trial date. I think we could probably try to work together
15 about the Markman date and some of those later dates to
16 preserve the trial date.

17 MR. PEREZ: We have talked about actually and I have
18 agreed to moving it -- any of the two weeks after
19 Thanksgiving. It is now set for November 17th. They wanted
20 to kick that because they have a conflict of trial. We are
21 willing to do that, obviously, at the Court's convenience.

22 MR. BAXTER: Your Honor, I communicated to the Court
23 staff about the Markman Hearing. In all candor, when I talked
24 to the staff they looked at your calendar and you have got
25 some trials and some other dates that may conflict. I didn't

1 want to wade off in the swamp without revealing that. The
2 Court staff has looked at your calendar. And we had asked not
3 because of these problems but because of the trial conflict
4 one of the lawyers in this case has. I don't want the Court
5 to move the day without knowing that your staff at least
6 understands that you have got some date problems.

7 THE COURT: Okay. All right. The Court will -- is
8 going to enter an order. We will have it out to you by the
9 end of this week outlining for you what you need to do and
10 adjusting the dates as the Court deems appropriate.

11 Anything further from the parties?

12 MR. BAXTER: No, Your Honor.

13 THE COURT: All right. I would just admonish both
14 parties, and I don't know which side the communication is -- I
15 hear both of you saying we are wanting to talk and the other
16 one is not talking. Let's talk. Let's get these things
17 resolved. Let's be candid with each other. Let's don't be
18 hiding the ball. Let's get it out on the table, find out what
19 this case is about so y'all can evaluate it. And if you can't
20 get it settled, we will get it narrowed down to something
21 triable and we will try it. Okay?

22 MR. PEREZ: Thank you, Your Honor.

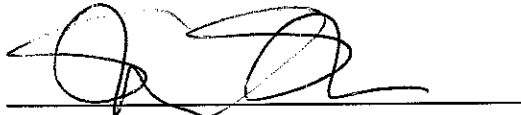
23 THE COURT: We will be adjourned.

24 MR. BAXTER: Thank you, Your Honor.

25 (End of hearing.)

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.



SHEA SLOAN, CSR, RPR
OFFICIAL COURT REPORTER
STATE OF TEXAS NO. 3081

7/15/05